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In The

Supreme Court of the United States

October Term, 1997

IN RE THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION

MICHAEL R. WEAVER, *et al.*,

Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

The questions presented for review by petitioners do not accurately reflect the issues before the Third Circuit or the Third Circuit's analysis and holding. Accordingly, Prudential presents the following properly framed question:

> Should the Supreme Court grant a writ of certiorari to review the Third Circuit's decision that petitioners Rick A. Martin and Michael R. Weaver, who did not contest on appeal that they knowingly agreed to arbitrate employment disputes with Prudential, must arbitrate their employment related claims against Prudential because their claims do not fall within the "insurance business" exception to the NASD Code of Arbitration Procedure?

LIST OF ALL PARTIES AND PUTATIVE PARTIES

The Petition does not accurately list the parties who are properly before this Court. Only the following are properly parties before this Court:

Rick A. Martin, Plaintiff/Petitioner and Appellee Below.

Michael R. Weaver, Plaintiff/Petitioner and Appellee Below.

The Prudential Insurance Company of America, Defendant/Respondent and Appellant Below.

The following petitioners are not properly before this Court because they were not parties to the appeal decided by the Third Circuit:

Eugene Kroll, Plaintiff/Petitioner;

Carol Hales, Plaintiff/Petitioner;

Anthony Ybarra, Plaintiff/Petitioner;

Lori Anderson, Plaintiff/Petitioner;

Rebecca Montero, Plaintiff/Petitioner;

Wilmer Sigwarth, Plaintiff/Petitioner;

Steven Demarais, Plaintiff/Petitioner;

Theodore Willenbring, Plaintiff/Petitioner;

Darrell Dunn, Plaintiff/Petitioner;

Greg Knutson, Plaintiff/Petitioner;

Donald Hales, Plaintiff/Petitioner;

Earl Schulenburg, Plaintiff/Petitioner;

Anthony Bodway, Plaintiff/Petitioner; and

G. Annette Nantz, Plaintiff/Petitioner.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Prudential Insurance Company of America ("Prudential") is a mutual insurance company. To the extent it is required to respond to Supreme Court Rule 29.6, Prudential states that it does not have any parent companies. Prudential has numerous wholly owned subsidiaries. The following are Prudential's nonwholly owned subsidiaries:

745 Property Investments

Prudential Mortgage Asset Corporation II

Prudential of America Life Insurance Company (Canada)

Preferred Coastal Realty, Inc.

Bache & Co. S.A. de C.V. (Mexico)

Lapine Holding Company

Lapine Development Corporation

Lapine Technology Corporation

Prudential Securities (Brazil) LTDA

Prudential-Bache International (Hong Kong) Ltd.

Prudential Bache Futures (Hong Kong) Limited

Prudential Bache Nominees (Hong Kong) Limited

Prudential Bache Securities (Hong Kong) Limited

Prudential Bache Finance (Hong Kong) Limited

PAMA (Indonesia) Limited

P.T. PAMA Ventura Indonesia

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Respondent The Prudential Insurance Company of America ("Prudential") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed by the petitioners, who are all former Prudential employees but most of whom were not parties to the proceedings in the United States Court of Appeals for the Third Circuit.

PRELIMINARY STATEMENT

There is no reason for the Supreme Court to accept this petition for review on a writ of certiorari. The Third Circuit's decision involves nothing more than the application of the familiar principle of federal arbitration law that

> [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986) (*quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

In this case, the Third Circuit was asked to decide whether wrongful discharge and other claims asserted by former insurance sales representatives of Prudential were arbitrable as a result of the execution by the representatives of a version of the Uniform Application for Securities Industry Registration of Transfer ("Form U-4"), which incorporated by reference the NASD Code of Arbitration Procedure ("NASD Code"). Specifically, the question was whether the "insurance business" exception in the NASD Code should be construed so broadly as to render non-arbitrable petitioners' employment claims. Having determined that it could not "say with positive assurance" that the Form U-

4 contract language indicated a clear intent not to arbitrate such disputes, the Third Circuit reached the unsurprising conclusion that under such circumstances "a presumption in favor of arbitration applies."

No federal court decision (other than the district court opinion reversed by the Third Circuit here) has ever held otherwise. The two cases petitioners claim to be inconsistent with the Third Circuit's decision in fact addressed wholly separate issues. *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), concerned arbitrability of employment disputes prior to the 1993 amendments to the NASD Code (the amendments explicitly state that employment disputes are arbitrable). *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), focused on whether plaintiffs in that case had knowingly waived their rights under the provisions of Title VII to sue in federal court when they executed Form U-4s. Neither case discusses the "insurance business" exception in the NASD Code. Moreover, petitioners' arguments based on the actual holdings of *Farrand* and *Lai* were never raised before the Third Circuit. They were presented to the district court, which expressly rejected them. Having prevailed in the district court on their "insurance business" exception argument, however, the plaintiffs chose not to present these other points to the Third Circuit on appeal. Having declined to raise these issues below for tactical reasons, they may not resurrect these arguments before this Court.

Finally, fourteen of the petitioners have no right to proceed before this Court. Only two of the sixteen listed petitioners, Michael R. Weaver and Rick A. Martin, were parties to the Third Circuit proceedings. The others have similar, but factually slightly different cases, which were dismissed in favor of NASD arbitration by the district court in reliance on the Third Circuit

decision. These fourteen additional "petitioners" were not parties to the appeal below, did not seek to intervene in those proceedings, and have not appealed the dismissal of their cases to the Third Circuit (if such an appeal were even permissible prior to the conclusion of the arbitration). It is unclear why they have been added to the Petition, except perhaps to make this matter appear more complex and significant than it really is. What is clear is that these individuals have no right whatsoever to petition this Court.[1]

In short, the decision below was not entered in conflict with those of any other United States Court of Appeals. It simply applied principles of federal law, well established by this Court on numerous occasions, to the facts of the *Martin* and *Weaver* cases and those of three other agents who were parties to the appeal below and chose not to join the Petition. There are no compelling reasons to grant the Petition. It should be denied.

STATEMENT OF THE CASE

The statement of the case in the Petition does not provide a full or accurate description of the proceedings or decisions below, or the different (or even non-existent) role of the various petitioners in those proceedings. Therefore, pursuant to Supreme Court Rule 15.2, Prudential submits this statement of the case to provide a correct and accurate description of the prior proceedings and to correct misstatements of fact and law in the Petition that bear on what issues properly would be before the Court if certiorari were granted.

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1. These petitioners are Eugene Kroll, Carol Hales, Anthony Ybarra, Lori Anderson, Rebecca Montero, Wilmer Sigwarth, Steven Demarais, Theodore Willenbring, Darrell Dunn, Greg Knutson, Donald Hales, Earl Schulenburg, Anthony Bodway and G. Annette Nantz. The first thirteen are represented by Fred L. Neff, the counsel of record for petitioners. For ease of reference, all are referred to herein as the "Neff petitioners."

A. The Form U-4 Arbitration Agreement

The relevant facts are not in dispute. As a condition of employment each of Prudential's sales representatives, including the petitioners, executed a Uniform Application for Securities Industry Registration or Transfer Form U-4 agreement ("Form U-4") agreeing to arbitrate any disputes with Prudential pursuant to the National Association of Securities Dealers Code of Arbitration Procedure (the "NASD Code").[2] Although there are minor variations between some of the petitioners' Form U-4s, each petitioner agreed to comply with the most current version of the NASD's rules and regulations, including the arbitration provisions of the NASD Code. In particular, each petitioner agreed to:

> arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the . . . [NASD] as may be amended from time to time.

and

> abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the . . . [NASD] as they

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2. Some of the facts in this section are derived from the Third Circuit's opinion and order, which is attached as Appendix B to the Petition and reported as *In re The Prudential Insurance Company of America Sales Practices Litigation All Agent Actions*, 133 F.3d 225 (3d Cir. 1998). The Third Circuit's opinion is referred to herein in the form "App. B at __," and the Federal Reporter cite is also given. The Third Circuit's finding that the agents executed Form U-4s as a condition of employment is at page 8a of Appendix B and 133 F.3d at 228.

> are and may be adopted, changed or amended from time to time.

(App. B at 7a, 133 F.3d at 228.)

The Form U-4 agreement to arbitrate thus incorporates by reference the NASD Code. When the Code was adopted in 1968, it only provided for arbitration of securities-related disputes. The Code was amended in 1980, however, to include "any dispute, claim or controversy arising out of or in connection with the business of an NASD member" whether or not securities-related. Securities Exchange Act of 1934 Release No. 16860, May 30, 1980, 1980 SEC LEXIS 1375, at *2. The purpose was "to provide *investors* with a simple and inexpensive procedure for the resolution of controversies with brokerage firms." 44 Fed. Reg. No. 245, 75,255 (Dec. 19, 1979) (emphasis added). The NASD recognized that this expansion in the scope of arbitrable disputes could overwhelm the NASD arbitration system with customer claims about their insurance policies:

> [T]he number of *insurance-only* claims involving insurance companies is so disproportionately large in relation to their securities business that to include such claims would unduly burden the arbitration system. In addition, the inclusion of such claims could result in a requirement to arbitrate matters that are *intrinsically insurance*, that is, matters with respect to which the [NASD] does not believe it should mandate arbitration.

Id. (emphasis added). Accordingly, as part of the amendment the NASD excluded from arbitration "disputes involving the insurance business of any member which is also an insurance company." *Id.*

Although the NASD always considered employment-related disputes to be subject to arbitration, the original NASD Code

did not expressly say so. The NASD amended the Code, effective October 1, 1993, "to clarify" (the NASD's term) that disputes "arising out of the employment or termination of employment of [an] associated person" — including those employed by insurance companies — are subject to binding arbitration. 58 Fed. Reg. No. 138, 39070 (July 21, 1993). Rule 10101 of the NASD Code provides for the arbitration of:

> any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company[.]

Thus, when the former agent appellees filed their lawsuits against Prudential in 1995, the NASD Code expressly stated that any claims arising out of their employment or its termination were subject to arbitration. All of petitioners' claims fall within this provision. (*See* App. B at 13a-15a, 133 F.3d at 231.) Prudential asserts that it properly treated and terminated each of the petitioners who were before the Third Circuit, while these petitioners allege they were mistreated or terminated for complaining about or refusing to participate in what they describe as improper sales practices. (*See* App. B at 13a-14a, 133 F.3d at 231.) Resolution of their claims requires an assessment of their job performance and the reasons for termination.

B. District Court Proceedings

The petitioners' cases were transferred to the United States District Court for the District of New Jersey for consolidated pre-trial proceedings as part of a pending multidistrict

proceeding that also includes individual and class policyholder actions. *In re The Prudential Insurance Company of America Sales Practices Litigation*, MDL No. 1061, Master Docket No. 95-4704 (AMW). Following transfer, Prudential moved to compel petitioners Rick A. Martin and Michael R. Weaver and former agents Michael D. Gordon, Herbert Schulte and Kenneth R. Young to arbitrate their claims pursuant to Section 3 of the Federal Arbitration Act.[3] The former agents opposed the motion, arguing that their employment disputes were not arbitrable despite the plain language of their Form U-4 agreements and the NASD Code.

On April 19, 1996, the district court, by the Honorable Alfred M. Wolin, issued its opinion and order on Prudential's motion.[4] Judge Wolin analyzed in detail the panoply of arguments raised by the former agents. He first held that Prudential could enforce the plaintiffs' Form U-4 arbitration agreements, even though the agents listed Pruco Securities Corp. ("Pruco"), Prudential's wholly-owned limited broker-dealer subsidiary, rather than Prudential as their "firm" for purposes of NASD registration. (App. C at 34a-36a, 924 F. Supp. at 634-35.) The court found that the former agents had agreed to arbitrate disputes not only with their listed "firm" but also with "a customer, or any other person." (App. C at 34a-35a, 924 F. Supp. at 634.) "Clearly, Prudential is an 'other person' whose disputes with its agents are covered by the current NASD

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3. Only Martin and Weaver are petitioners herein. Gordon did not contest Prudential's motion to compel arbitration, the district court did not address the terms of his Form U-4 agreement, and his Form U-4 agreement was not at issue on the appeal to the Third Circuit. Schulte and Young were appellees at the circuit court level, but have not joined in the Petition.

4. The district court's opinion and order are attached as Appendix C to the Petition. "App. C at __" refers to the April 19, 1996 opinion, which is reported at *In re The Prudential Insurance Company of America Sales Practices Litigation*, 924 F. Supp. 627 (D.N.J. 1996).

arbitration rules." (*Id.*) The district court further held that Prudential was entitled to enforce the Form U-4 arbitration provisions because the Form U-4s indicated the agents would maintain an NASD registration with Prudential and because the agents executed the Form U-4s solely in connection with their Prudential employment. (App. C at 36a, 924 F. Supp. at 635.)

The district court then found that the present version of the NASD Code plainly provides for arbitration of employment disputes, emphasizing that the 1993 amendments added language "which makes it clear that the arbitration provisions currently cover employment disputes," and that each of the agents had explicitly agreed in their Form U-4s to abide by the terms of the NASD Code *as amended.* (App. C at 38a-39a, 43a, 924 F. Supp. at 636, 638.) Since the agents filed suit after the effective date of the 1993 amendment, there could be no doubt that their employment disputes fell within the scope of the Code's arbitration mandate. (App. C at 43a, 924 F. Supp. at 638.)[5] Thus the district court distinguished the Seventh Circuit's opinion in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), holding that,

> since all the agents filed their claims after the effective date of the amendment, they are bound thereby and may not avoid the arbitration provisions simply because their disputes are employment related.

(App. C at 46a, 924 F. Supp. at 639.) None of the agents appealed from this ruling.

The district court also rejected an argument advanced by petitioner Martin, based on *Prudential Insurance Company of*

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5. The district court noted that it found "ample indications that the preamendment NASD Code applied to employment disputes such as the agents' claims." (App. C at 46a, 924 F. Supp. at 639.)

America v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), that his Form U-4 agreement to arbitrate was a "contract of adhesion" and thus unenforceable. (App. C at 51a-54a, 924 F. Supp. at 642-43.) "[B]asic contact law and longstanding judicial precedent clearly preclude a holding that Martin's U-4 is a contract of adhesion." (App. C at 54a, 924 F. Supp. at 643.) None of the agents appealed from this ruling, either.[6]

Despite concluding that the agents' employment related disputes with Prudential were arbitrable pursuant to the NASD Code, the district court nevertheless proceeded to rule that they need not arbitrate their claims against Prudential. Contrary to the reasoning and holding of every other federal court to address the issue, the district court decided that the agents' claims involved Prudential's insurance business, and thus fell within the NASD Code's exception for "disputes involving the insurance business of any member which is also an insurance company." (App. C at 47a-51a, 924 F. Supp. at 640-42.) The district court conjectured, without support from the Code's drafting history, that the insurance exception was adopted because securities arbitrators lack the expertise to resolve insurance-related issues. (App. C at 47a, 924 F. Supp. at 640.) The court also mischaracterized the agents' employment claims as primarily requiring an evaluation of Prudential's insurance sales practices, affording undue weight to certain common allegations between the employment claims and the policyholder claims in the MDL proceeding. (*Id.*)

6. The district court evaluated and rejected a number of other arguments offered by different agents. The court ruled that Martin's employment agreement with Prudential did not supersede his earlier executed Form U-4 because the Form U-4 is not a contract with Prudential, but rather with the securities exchanges. (App. C at 36a-37a, 924 F. Supp. at 635.) Judge Wolin also held that Young could not avoid his obligation to arbitrate by resigning or terminating his employment, or by claiming he had never sold securities. (App. C at 37a-38a, 924 F. Supp. at 636.)

C. The Third Circuit Reversal

Prudential appealed Judge Wolin's decision to the Third Circuit. Since Prudential had prevailed on all but one of the issues before the district court, it raised only that issue on appeal:

> Having held that the appellees had knowingly agreed to arbitrate employment-related disputes with Prudential, did the district court err in holding that appellees did not have to arbitrate their pending employment-related claims because they fall within the 'insurance business' exception to the NASD Code of Arbitration Procedure?

This was the only issue before the Third Circuit. The appellees did not cross-appeal from any of Judge Wolin's rulings against them, with two limited and irrelevant exceptions.[7]

The Third Circuit reversed the order of the district court to the extent it denied Prudential's motion compelling arbitration and remanded the cases to the district court for further proceedings. (App. B at 20a-21a, 133 F.3d at 235.) The Court of Appeals held that consistent Supreme Court precedent concerning the proper construction of arbitration agreements required that petitioners Martin and Weaver arbitrate their employment disputes with Prudential. An opinion was filed and an order was entered on January 7, 1998.

To determine the question of the applicability of the insurance business exception to employment-related claims, the

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7. Appellee Kenneth Young cross-appealed two rulings to the Third Circuit. Young contended that he was not an "associated person" within the meaning of the NASD Code and that Prudential had waived its right to compel arbitration. The Third Circuit rejected Young's contentions. (App. B at 10a n.7, 133 F.3d at 229 n.7.) Young did not join the Petition.

Third Circuit first sought to ascertain the intent of the parties from the language of their Form U-4 agreements to arbitrate and the language and drafting history of the NASD Code, which the Form U-4s incorporate. The Form U-4 unambiguously provides that the parties agree to arbitrate disputes, claims, and controversies required to be arbitrated under the NASD Code. The circuit court then found from the "plain language" of the NASD Code that there can be "no question that the parties intended to arbitrate any dispute 'arising out of the employment or termination of employment.' " (App. B at 14a-15a, 133 F.3d at 232.) The panel stated that the NASD intended even employment disputes involving public policy issues to be arbitrated. (App. B at 16a, 133 F.3d at 233.)

The circuit court also noted that "the Code carves out an exception where the dispute involves the 'insurance business of any member.' " (App. B at 15a, 133 F.3d at 232.) However, the court found the scope of that provision to be ambiguous:

> Less clear, however, is the coverage of this exception, as several ambiguities immediately arise in the clause's interpretation. For example, it is not clear whether the business of insurance exception applies to employment related disputes, to disputes in connection with a member's business, or to both. More importantly, neither the Code nor NASD by-laws defines what is meant by the "insurance business" and the intended scope of its coverage.

(App. B at 15a, 133 F.3d at 232.)

As the Third Circuit noted,

> the NASD did not comment as to the potential interplay between the employment clause and the

> insurance business exception so as to illuminate the intended scope of arbitrable disputes in this context.

(App. B at 16a, 133 F.3d at 233.) The Court stressed the NASD's clear intention that employment disputes be arbitrated, and contrasted that fact with the NASD's statements that the "insurance business" exception applies only to "insurance-only" or "intrinsically insurance" claims:

> As a result, we are left with an unanswered question that is at the heart of this case — namely, whether employment disputes that implicate a member's insurance business fall under the insurance business exception. On the one hand, it is clear, from both the language of the text and its history, that employment disputes were unequivocally intended to be arbitrated. This is so even if the employment claim raises policy matters well beyond the narrow legal issue of contract breach or ordinary employment torts. These would include, for instance, discrimination based on age, sex, or race. *See* 58 Fed. Reg. at 39,071.
>
> On the other hand, the NASD has expressed a clear and unequivocal intent not to arbitrate "insurance-only" or "intrinsically insurance" claims. The contours of an "insurance-only" or "intrinsically insurance" claim are too amorphous to define with precision in the present factual context, especially where it is the exception to a broad arbitration provision. We can easily imagine scenarios, such as the one before us, where a claimant, in order to recover on normally arbitrable disputes, would require the arbitrator to decide insurance issues. Thus, it would be difficult to unambiguously announce, on the basis of

> the NASD Code and its drafting history, whether the parties intended that these sorts of controversies are "intrinsically insurance" without any further indication of the meaning of the phrase.

(App. B at 16a-17a, 133 F.3d at 233.)

Faced with this ambiguity, the Third Circuit did exactly as this Court has instructed in numerous opinions. With no guidance as to the meaning of the phrases "insurance-only" or "intrinsically insurance," the Third Circuit adhered to the presumption in favor of arbitration, and declined to expand the exception in the absence of a clear indication of the parties' purpose and the intended scope of coverage:

> We ultimately cannot say with positive assurance that the language of Form U-4 and the NASD Code, as well as their drafting histories, indicate the parties' desire not to arbitrate employment disputes that require the resolution of an insurance business issue. There is only one clear expression of intent here —that employment disputes are subject to arbitration while "intrinsically insurance" claims are not. Because this court cannot say with certainty what is meant by "intrinsically insurance" claims, and whether it embraces employment disputes, our mandate is clear: a presumption in favor of arbitration applies and doubts in construction are resolved against the resisting parties. Thus, we will reverse the district court's ruling that the insurance business exception exempted the plaintiffs' claims from arbitration in this case.

(App. B at 19a, 133 F.3d at 234.)

After receiving the decision, on January 12, 1998, Prudential's counsel of record advised the Third Circuit that its

opinion, while accurate with respect to all the facts pertinent to the issues on the appeal, did not reflect that Prudential ceased to be a member of the NASD on May 22, 1996. The facts relevant to the Third Circuit appeal and this Petition, however, remained unchanged. Prudential was a member of the NASD when Weaver, Martin and the other agent appellees executed their Form U-4s and when Prudential moved to compel them to arbitrate their disputes with Prudential. Pruco had always been and remains an NASD member. The company's current membership status did not alter the Third Circuit's or the district court's legal analysis, which focused on whether the parties intended to arbitrate their disputes at the time the former agents executed their Form U-4s. Prudential was always an intended beneficiary of the Form U-4 agreements with the NASD. (App. B at 10a-12a, 133 F.3d at 229-30.)

Weaver, Martin, Young and Gordon subsequently requested a rehearing or rehearing *in banc*. They made no claim in that rehearing request that Prudential's NASD membership status in 1996 affected in any way their obligations to arbitrate their claims against Prudential (nor did they raise the issue in the district court). Nor did any of the other petitioners before this Court seek to intervene on that (or any other) basis before the Third Circuit. On February 23, 1998, the Third Circuit denied both the request for rehearing and the request for rehearing *in banc*. The Third Circuit chose not to amend its decision in any respect in response to the January 12 letter from Prudential's counsel or the matters raised in appellees' request.[8] Only the dissenting judge on the original panel is identified as having thought rehearing appropriate. (App. A at 2a). The Petition for a Writ of Certiorari followed.

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8. The February 23, 1998 opinion denying the request for rehearing and rehearing *in banc* is attached as Appendix A to the Petition.

REASONS FOR DENYING THE PETITION

I.

THE THIRD CIRCUIT CORRECTLY RULED THAT WEAVER'S AND MARTIN'S CLAIMS DO NOT FALL WITHIN THE INSURANCE BUSINESS EXCEPTION.

The Third Circuit's decision is a soundly reasoned application of basic principles governing federal arbitration law, which have been enunciated in an unbroken series of decisions from this Court. Petitioners offer no compelling reason for this Court to exercise its discretion to review the decision on a writ of certiorari. As described above, the panel closely analyzed the language and history of the NASD Code and concluded that the Code provides no clear indication of intent as to "whether employment disputes that implicate a member's insurance business fall under the insurance business exception." (App. B at 16a-17a, 133 F.3d at 233.) Without a clear expression of intent, the Third Circuit declined to "grope for a rule that would resolve the ambiguity." (App. B at 18a, 133 F.3d at 234.)

Instead, the Court of Appeals simply applied this Court's presumption in favor of arbitration to resolve the doubts in construction against the parties resisting arbitration. (App. B at 14a-18a, 133 F.3d at 232-34.)

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986) (*quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83

(1960)). Arbitration must be compelled unless the party opposing it presents "forceful evidence of a purpose to exclude the claim." *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960); *see also Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 338 (7th Cir. 1984).

Most importantly,

> any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

> [W]hen a court interprets . . . provisions in an agreement covered by the FAA, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); *accord Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Volt Info. Sciences, Inc. v. Board of Trustees of Stanford Univ.*, 489 U.S. 468, 475-76 (1989). The duty to construe arbitration agreements liberally in favor of arbitration applies to the interpretation of agency rules and regulations, such as the NASD Code, that provide for the arbitrability of disputes. *See Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 798 (10th Cir. 1995).

Just as this Court has mandated, the Third Circuit properly resolved its "doubts concerning the scope" of the "insurance

business" exception in favor of arbitration. A writ of certiorari is not warranted.

II.

THE THIRD CIRCUIT'S DECISION IS IN ACCORD WITH EVERY OTHER FEDERAL COURT TO HAVE CONSIDERED THE APPLICATION OF THE INSURANCE BUSINESS EXCEPTION TO EMPLOYMENT DISPUTES.

The Third Circuit's decision was hardly unique. Contrary to the petitioners' argument, every other federal court to address this issue, including two other Courts of Appeals, have reached the identical conclusion.

In *Armijo v. Prudential Insurance Company of America*, 72 F.3d 793 (10th Cir. 1995), the Tenth Circuit applied the presumption in favor of arbitration in this context. Three former Prudential sales representatives, all of whom had executed Form U-4s, sued the company under state and federal law for allegedly discriminatory treatment. 72 F.3d at 795-96. The plaintiffs were actually terminated, Prudential explained, because they had engaged in illegal insurance sales practices. *Id.* at 800. Prudential moved to compel arbitration pursuant to the plaintiffs' Form U-4 agreements. *Id.* at 795-96. The plaintiffs used Prudential's defense of their terminations to claim that their complaint fell within the insurance business exception. *See id.* at 800.

The Tenth Circuit rejected the plaintiffs' argument. "Our obligation to construe arbitration clauses broadly compels us to construe this [insurance] exception to the arbitration clause narrowly." *Id.* Employment-related claims, even when asserted against an insurance company, are "predicated on [the insurer's] role as an employer rather than as an insurer." *Id.* The rights of

a discharged insurance company employee are never "predicated" on laws or obligations pertaining to the transfer of risk of the insurer-insured relationship, or that otherwise regulate the "business of insurance." A broader interpretation of the insurance exception would render illusory the plaintiffs' agreement in their Form U-4s to arbitrate employment disputes. *Id.*

The Eleventh Circuit, the only other federal appeals court to have addressed the application of the insurance business exception to employment related claims, is also in accord with the decision below and with *Armijo. Kidd v. Equitable Life Assurance Soc'y of the U.S.*, 32 F.3d 516 (11th Cir. 1994), *aff'd after remand*, 119 F.3d 11 (11th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 626 (1997). After analyzing the language of the NASD Code and its amendments, the Eleventh Circuit found that "Equitable's personnel practices do not constitute a dispute over its 'insurance business.' " *Id.* at 519 n.5. "If the NASD did not mandate arbitration of the employer-employee disputes" of its insurance company members and their employees, the panel reasoned, "there would be no reason to require Appellees to sign U-4 forms promising to arbitrate such disputes." *Id.* at 520.

Every federal district court that has addressed the insurance business exception in the context of employment claims (with the exception of the district court below) has resolved doubts in favor of arbitration and found the insurance business exception not to apply. Many of these cases involved putative whistleblower claims concerning the same allegedly improper sales practices as the petitioners allege led to their dismissals. The district courts in these cases recognized that terminated employees are not entitled to avoid an arbitral forum simply because their retaliation claims relate to purported misconduct directed at policyholders. "That the facts underlying the

Plaintiff's claims may involve allegations of insurance practices, does not bring Plaintiff's claims within the insurance exception." *Battle v. Prudential Ins. Co. of Am.*, 973 F. Supp. 861, 869 (D. Minn. 1997).

> Breach of an employment contract, wrongful termination, and failure to pay wages are paradigm employment concerns, no matter how much insurance Prudential may sell or how it may sell it.

Jankauskas v. Prudential Ins. Co. of Am., 1997 WL 241143, at *2 (E.D. Pa. May 6, 1997); *see also Voith v. Metropolitan Life Ins. Co.*, No. 4:CV-94-0364, slip op. at 11-12 (M.D. Pa., Dec. 6, 1994) (insurance business exception not applicable to defamation claim even though plaintiff argued that the claim was based on MetLife's alleged unlawful insurance practices); *Young v. Metropolitan Life Ins. Co.*, No. 94-3274, slip op. at 1 n.1 (E.D. Pa. Sept. 12, 1994) (insurance business exception not applicable to plaintiff's claim that he was wrongfully discharged after reporting on MetLife's alleged fraudulent insurance practices).[9]

In the face of this consistent precedent — which goes wholly unmentioned in the Petition — petitioners try to manufacture a

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9. *See also, e.g., Goforth v. Prudential Ins. Co. of Am.*, No. SA-97-CA-1126, slip op. at 5 (W.D. Tex. Jan. 23, 1998); *Cular v. Metropolitan Life Ins. Co.*, 961 F. Supp. 550, 557-58 (S.D.N.Y. 1997); *Neary v. Prudential Ins. Co. of Am.*, 1997 WL 114789, at *3 (D. Conn. Feb. 24, 1997); *Vitone v. Metropolitan Life Ins. Co.*, 943 F. Supp. 192, 198-99 (D.R.I. 1996), *recons. denied*, 954 F. Supp. 37 (D.R.I. 1997); *Weinstein v. Equitable Life Assurance Soc'y of the U.S.*, 1996 WL 557321, at **2-3 (E.D. Pa. Sept. 26, 1996); *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F. Supp. 1282, 1291-92 (N.D. Ill. 1995), *order clarified by* 916 F. Supp. 729 (N.D. Ill. 1996); *Trumbetta v. Metropolitan Life Ins. Co.*, 1994 WL 481152, at *2 (E.D. Pa. Sept. 1, 1994); *Prudential Ins. Co. of Am. v. Shammas*, 865 F. Supp. 429, 432-33 (W.D. Mich. 1993); *Foley v. Presbyterian Ministers' Fund*, 1992 WL 63269, at *2 (E.D. Pa. Mar. 19, 1992).

split in the circuits by citing decisions of the Seventh Circuit in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993) and the Ninth Circuit in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995). (*See* Petition at 7.) In fact, there is no conflict at all. Neither *Farrand* nor *Lai* discuss the insurance business exception. Nor does either case hold that employment disputes are not arbitrable (as the Petition claims). (Petition at 12.) *Farrand* holds that employees who brought claims prior to the effective date of the 1993 amendments to the NASD Code are not bound to arbitrate their employment related disputes. *Lai* holds that where a plaintiff had not knowingly waived her rights to sue in federal court under Title VII, she could not be compelled to arbitrate such claims.

In fact, the district court found both decisions inapplicable to the facts of Weaver's and Martin's cases. (*See* App. C at 38a-46a, 51a-54a; 924 F. Supp. at 636-39, 642-43.) The *Farrand* decision only applies to claims filed before the effective date of the 1993 amendments to the NASD Code. Claims filed after the effective date are plainly arbitrable. *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F. Supp. 1282, 1288-89 (N.D. Ill. 1995), *order clarified by* 916 F. Supp. 729 (N.D. Ill. 1996). All of the petitioners here filed their claims after the 1993 amendments. For this reason, Judge Wolin found *Farrand* inapplicable. "Given the agents' explicit agreement to arbitrate under the NASD Code 'as amended,' the Court must look to the rules as they existed at the time the agents filed suit, and not before." (App. C at 43a, 924 F. Supp. at 638.)

The district court similarly found *Lai* irrelevant. The agents pointed to no statutory requirement of a knowing waiver, as required by *Lai*. Moreover, the district court noted that "*Lai* has been rather extensively criticized," and concluded that "basic contract law and longstanding judicial precedent clearly preclude

a holding that Martin's U-4 is a contract of adhesion." (App. C at 53a-54a, 924 F. Supp. at 642-43.) This Court has ruled that Form U-4 agreements to arbitrate employment discrimination claims, which are a condition of employment in the securities industry, will be upheld and enforced " 'save upon such grounds as exist at law or in equity for the revocation of any contract.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991). Voluntary execution of an arbitration agreement, even when it is a condition of employment, simply does not equate to duress or coercion sufficient to invalidate the arbitration agreement, any more than it would suffice to invalidate an employment agreement. *Beauchamp v. Great West Life Assurance Co.*, 918 F. Supp. 1091, 1098 (E.D. Mich. 1996).[10]

The Petitioners also attempt to mislead this Court when they assert that had "their cases remained in the respective courts and circuits" in which they were brought, "instead of being consolidated pursuant to the rules for multi-district litigation, many of these cases would be proceeding to a jury trial." (Petition at 8, 15, 16-17.) Fifteen of the sixteen petitioners filed suit in Minnesota, Kentucky or Missouri. The petitioners point to no authority anywhere in the Eighth or Sixth Circuits to support the proposition that the law there differs from that announced by the Third Circuit below. In fact, both the District

10. *Lai* has been rejected throughout the other federal courts as contrary to this Court's decision in *Gilmer*, the strong public policy behind the FAA, the legislative history of Title VII, and fundamental principles of contract law. *See, e.g., Seus v. John Nuveen & Co.*, __ F.3d __, 1998 WL 294020, at *8 n.2 (3d Cir. June 8, 1998); *Beauchamp*, 918 F. Supp. at 1095-98; *Battle v. Prudential Ins. Co. of Am.*, 973 F. Supp. 861, 864-67 (D. Minn. 1997); *Rice v. Brown Bros. Harriman & Co.*, 1997 WL 129396, at *4 (S.D.N.Y. Mar. 21, 1997); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1473-75 (N.D. Ill. 1997); *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1455 (D. Minn. 1996); *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 107 (S.D.N.Y. 1995); *Hall v. MetLife Resources*, 1995 WL 258061, at **3-4 (S.D.N.Y. May 3, 1995).

of Minnesota (where thirteen of the petitioners filed) and the Western District of Kentucky (where Martin's case was filed) have held that the NASD Code requires arbitration of employment disputes.[11] Although the petitioners rely on *Farrand* as support for a different result in the Seventh Circuit, in point of fact the District Court for the Northern District of Illinois in *Wojcik* has made clear that *Farrand* does not apply to post-1993 amendment claims. 901 F. Supp. at 1286-89. The Northern District of Illinois has also criticized and refused to follow *Lai*. *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1474-75 (N.D. Ill. 1997). The petitioners would be in no different positions had their cases never been transferred to the MDL proceedings.

III.

THE PETITIONERS MAY NOT RAISE ISSUES HERE NOT RAISED BEFORE THE COURT OF APPEALS.

Since *Farrand* and *Lai* do not discuss the sole issue that was before the Third Circuit — the application of the "insurance business" exception to employment claims — petitioners may not raise with this Court the issues that actually were addressed in *Farrand* and *Lai*. Petitioners' attempt to do so is particularly

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11. In *Battle*, 973 F. Supp. at 867-68 (D. Minn. 1997), the District Court for Minnesota found that a former Prudential agent was required to arbitrate his employment claims against Prudential, expressly rejecting the reasoning of *Farrand*. In *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1455 (D. Minn. 1996), the District of Minnesota strongly criticized the *Lai* decision and declined to follow it. Likewise, the United States District Court for the Western District of Kentucky recently compelled arbitration of Title VII claims, expressly rejecting the plaintiff's contention that the agreement was unconscionable because it could require her to pay one half of the arbitration costs, implicitly rejecting the reasoning of *Lai*. *Walker v. MDM Serv. Corp.*, 1998 WL 141904, at *4 (W.D. Ky. Feb. 5, 1998).

inappropriate because Martin relied on the *Farrand* and *Lai* decisions before the district court, but chose not to cross-appeal Judge Wolin's adverse rulings on those issues to the Third Circuit. In a section of the agents' brief explaining the holdings of the district court, the agents acknowledged that Judge Wolin had squarely rejected the *Farrand* and *Lai* arguments. This was the only time *Farrand* or *Lai* were mentioned in the Third Circuit briefing.

This Court has repeatedly held that absent compelling circumstances, issues not raised in the lower courts will not be examined for the first time on appeal to this Court. "Where issues are neither raised before nor considered [by the court below], this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).[12] This stringent policy protects the integrity of the certiorari process.

> The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system.

Taylor v. Freeland & Kronz, 503 U.S. 638, 646 (1992). No compelling circumstances are present here that would justify an exception to the Court's time-honored procedures. Petitioners' attempt to thwart the appellate system should be denied.

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12. *See also, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Brown v. Socialist Workers' '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 104-05 (1982); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

IV.

THE NEFF PETITIONERS HAVE NO RIGHT TO SEEK CERTIORARI.

Only petitioners Martin and Weaver, as parties to the proceedings below, are entitled to appeal the Third Circuit's decision and petition this Court for a writ of certiorari. The other fourteen petitioners are not properly before this Court and raise factual assertions that are not relevant to the cases actually on appeal.

The lawsuits filed by the Neff petitioners had not been transferred to the MDL at the time of Prudential's original motion to compel arbitration, and thus were not the subject of that motion. Those transfers occurred during the pendency of the motion before the district court and the proceedings in the Third Circuit. The district court stayed the proceedings in these cases, including motions to compel arbitration, until the Third Circuit reached a decision. The Neff petitioners did not seek reconsideration of, or appeal from, this stay order. Nor did they seek to intervene before the Third Circuit.

After the Third Circuit ruled, the district court dismissed the cases brought by the Neff petitioners in favor of NASD arbitration. None of the Neff petitioners moved for reconsideration on the merits before the district court or moved to alter or amend these judgments based upon their views of the particular facts of their cases and the purported impact of Prudential's NASD status. *Cf.* Fed. R. Civ. P. 59(e). Nor did any of the Neff petitioners appeal Judge Wolin's dismissal orders. Indeed, the Federal Arbitration Act provides that a party compelled to arbitration may not appeal that decision until the conclusion of that arbitration. 9 U.S.C. § 16(b). This prohibition perhaps explains, but does not justify, why these petitioners decided to make their belated appearance in this appeal.

The mere fact that the district court relied upon the Third Circuit decision to dismiss their cases does not give the Neff petitioners a right now to seek certiorari from that decision. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988); *see also Karcher v. May*, 484 U.S. 72, 77 (1987); *United States ex rel. Louisiana v. Boarman*, 244 U.S. 397, 402 (1917); *In re Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911) (per curiam). In *Marino*, for example, when a group of New York City police officers did not appeal from a judgment of the Southern District of New York and failed to move to intervene in an appeal to the Second Circuit brought by other officers, they were barred from appealing to the Supreme Court. "We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." 484 U.S. at 304.

Perhaps to camouflage their sudden appearance in the appeal, the Petition repeatedly claims that the January 12 letter from Prudential's counsel to the Third Circuit was erroneous. (*See* Petition at 5-6, 13-14 and 16.) These assertions are in actuality nothing more than attempts to delineate supposed distinctions between the facts of the cases of the real parties before the Third Circuit and the facts of the Neff petitioners' cases. In particular, the Neff petitioners assert that even though Prudential was an NASD member when it moved to compel arbitration of Martin's and Weaver's claims, the company was no longer an NASD member at the time it moved to compel arbitration of their cases, and thus the Third Circuit erred in its ruling. But the Neff petitioners were not parties to the Third Circuit appeal, and thus Prudential's statements to the Third Circuit were completely accurate and any factual distinctions that may be drawn are completely irrelevant.[13]

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13. By hiding the fact that Prudential's letter only referred to the facts of the cases actually before the Third Circuit, the Petition misleads this Court (Cont'd)

For the same reason that the petitioners cannot raise *Farrand* and *Lai* in this Court, the Neff petitioners cannot ask this Court to adjudicate for the first time the impact of the change in Prudential's membership status on its ability to compel arbitration of their claims. In any event, even assuming that the merits could be considered for the first time on this appeal, Prudential's current NASD status does not alter the outcome of the Third Circuit's analysis. A determination of whether the parties intended to arbitrate their disputes necessarily depends upon their intentions and relationship at the time plaintiffs executed their Form U-4s. *See, e.g., O'Neel v. National Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804, 806-07 (9th Cir. 1982). Prudential was always the intended beneficiary of the plaintiffs' Form U-4s. "All the plaintiffs signed Form U-4 as a condition precedent to their employment at Prudential." (App. B at 8a, 133 F.3d at 228.) While the Form U-4s named Pruco as "my firm," it also named Prudential as a broker-dealer with which the petitioners would maintain concurrent registration.

(Cont'd)

about the veracity of the letter. What is worse, the Neff petitioners go on to make a series of factual misstatements to this Court about their own cases. They claim that the cases of petitioners Kroll, Carol Hales and Ybarra were filed "after Prudential terminated its association with the NASD." (Petition at 6.) In actuality, Kroll filed a complaint on March 14, 1996, and Carol Hales and Ybarra filed complaints on April 8, 1996; Prudential ceased to be an NASD member on May 22, 1996. The Neff petitioners claim that the motions to compel arbitration of the Kroll, Carol Hales and Ybarra were "not filed while Prudential was still a member of the NASD." (*Id.*) In fact, Prudential's motions to compel arbitration of those cases were filed on April 15, May 8 and May 13, 1996, respectively. The Petition claims that petitioners "Kroll, Carol Hales, Ybarra, Willenbring and/or Schulenberg should not be compelled to arbitrate because they signed U-4 applications after May of 1996." (Petition at 4.) The Petition neglects to mention that each had previously signed Form U-4 agreements prior to May 22, 1996.

As the district court found, the

> context of [the plaintiffs'] registration plus the language [providing for concurrent registration] make it clear that the representation concerning arbitration, paragraph 5 [of the U-4], applied to . . . Prudential.

(App. C at 35a, 924 F. Supp. at 635 (*quoting Prudential Ins. Co. of Am. v. Shammas*, 865 F. Supp. 429, 430 (W.D. Mich. 1993)).) Judge Wolin found this point dispositive (*see* App. C at 35a, 924 F. Supp. at 635), and his holding on the issue was never appealed. The district court's holding is also in accord with the other courts which have considered the question. *See, e.g., Riccard v. The Prudential Ins. Co. of Am.*, No. 97-1390-CIV-ORL-22A, slip op. at 4 (M.D. Fla. Apr. 9, 1998); *Essex Corp. v. Independent Fin. Mktg. Group, Inc.*, 1998 WL 78279, at *4 (S.D.N.Y. Feb. 23, 1998); *Foley v. Presbyterian Ministers' Fund*, 1992 WL 63269, at *2 (E.D. Pa. 1992); *Weinstein v. Equitable Life Assurance Soc'y of the U.S.*, 1996 WL 557321, at *2 (E.D. Pa. Sept. 26, 1996).

As an NASD member in 1995, Prudential appropriately exercised its rights as a Form U-4 beneficiary when it moved to compel arbitration. In light of the Third Circuit's ruling on the insurance exception, those arbitrations should now proceed.

CONCLUSION

For the foregoing reasons, defendant-respondent The Prudential Insurance Company of America respectfully requests that the petition for a writ of certiorari be denied.

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